

SUMMARY ANALYSIS OF AMENDED BILL

Franchise Tax Board

Author: Hertzberg Analyst: Marion Mann DeJong Bill Number: AB 1392

Related Bills: See Legislative History Telephone: 845-6979 Amended Date: 04/14/1999

Attorney: Patrick Kusiak Sponsor:

SUBJECT: Action To Determine Validity Of Amount Of Tax

DEPARTMENT AMENDMENTS ACCEPTED. Amendments reflect suggestions of previous analysis of bill as introduced/amended _____.

AMENDMENTS IMPACT REVENUE. A new revenue estimate is provided.

AMENDMENTS DID NOT RESOLVE THE DEPARTMENT'S CONCERNS stated in the previous analysis of bill as introduced February 26, 1999.

FURTHER AMENDMENTS NECESSARY.

DEPARTMENT POSITION CHANGED TO _____.

REMAINDER OF PREVIOUS ANALYSIS OF BILL AS INTRODUCED February 26, 1999, STILL APPLIES.

OTHER - See comments below.

SUMMARY OF BILL

This bill would allow a taxpayer to bring an action to determine the validity of a tax, or other amount assessed by the Franchise Tax Board (FTB), by filing a statement with the Attorney General (AG) and either paying the amount due or posting a bond to guarantee payment of the amount due.

This bill would add corresponding provisions that would apply to the Board of Equalization (BOE).

SUMMARY OF AMENDMENT

The April 14, 1999, amendments would require a taxpayer to increase the amount of the bond if it became insufficient to cover the amount due, and would clarify that:

- the bill would apply to assessments and/or collection actions initiated prior to the effective date of this bill if the statute of limitations is open,
- the bill would not apply to claims for refund that are barred by another provision or rule of law, including the doctrine of *res judicata*,
- the bond would not stop the accrual of interest, and
- the bond must be sufficient to cover interest and penalties.

The April 14, 1999, amendments resolve some of the Implementation Considerations raised in the department's analysis of the bill as introduced February 26, 1999.

Except for the resolved Implementation Considerations, the department's analysis of the bill as introduced still applies. A discussion of the bill as amended is provided below. The Legal Consideration, remaining Implementation Considerations and the Board Position are reiterated below. In addition, Technical

Board Position:

<u> </u> S	<u> </u> NA	<u> </u> NP
<u> </u> SA	<u> </u> O	<u> </u> NAR
<u> </u> N	<u> </u> OUA	<u> X </u> PENDING

Department/Legislative Director Date

Johnnie Lou Rosas **5/17/1999**

Considerations and Amendments are provided.

SPECIFIC FINDINGS

This bill would allow a taxpayer to bring an action to determine the validity of a tax or other amount assessed by the FTB. To bring an action, the taxpayer must do both of the following:

- File a statement with the AG not later than five days before the date the action is filed, providing the grounds challenging the validity of the tax or other assessed amount.
- Either pay to FTB all amounts due (including interest and penalties with respect to the disputed assessment) or post a bond with FTB to guarantee payment of amounts reasonably expected to become due.

The bill would provide that the bond would not prevent the accrual of interest on the disputed amount. In addition, if during the time that the action is pending the court determines that the amount of the bond has become insufficient, the taxpayer must increase the amount of the bond to provide sufficient guarantee.

This bill would require the amount and terms of the bond and the sureties on the bond to be approved by and acceptable to the judge of the trial court hearing the action and the AG. The bill provides that approval should not be unreasonably withheld. If the bond is approved, no collection action on the tax or other assessed amount may be taken while the action is pending.

This bill would require the plaintiff (or the plaintiff's agent or attorney) to state under oath that the required statements challenging the validity of the tax or assessed amount were provided to the AG and that payment was made or a bond was posted.

This bill would apply to assessments made before, on or after the effective date of this bill provided the tax period (statute of limitations for assessments) is open. The bill would not authorize any action with respect to a claim where another provision or rule of law, including the doctrine of *res judicata* bars an action on that claim. (The doctrine of *res judicata* has the effect of preventing a party to an action from re-litigating a case that has already been decided).

LEGAL CONSIDERATION

The provisions of this bill are susceptible to constitutional challenge since the California Constitution (Article XIII, Section 32) specifically provides that no legal or equitable process shall issue in any proceeding in any court to prevent or enjoin the collection of any tax. If a taxpayer posts a bond, rather than paying all amounts due, and brings an action, this bill would prevent collection while that action is pending. However, Legislative Counsel has recently opined that this bill would not violate Article XIII, Section 32.

IMPLEMENTATION CONSIDERATIONS

This bill would raise the following implementation considerations. Department staff is available to help the author resolve these concerns.

- It is unclear whether the prohibition from collecting while an action is pending would prevent the collection of subsequent assessments on the same tax year (e.g., assessments based on information received from the Internal Revenue Service).
- The bill departs from the Code of Civil Procedure rules (Bond and Undertaking Law) regarding hearings for bonds and yet supplies no procedure for the Attorney General and the "judge of the court hearing the action" to reach agreement regarding the amount of the bond. Under the Code of Civil Procedure, the petitioner must post an undertaking of twice the amount of the money judgment. If a surety posts a bond, the amount of the bond must be one and a half times the amount of the money judgment.
- Since this bill would allow taxpayers to initiate a lawsuit by posting a bond rather than paying the full liability, more taxpayers may take their cases directly into court without adjudication before the BOE. This would result in increased litigation workloads.

TECHNICAL CONSIDERATIONS

Amendment 1 would make a minor technical correction.

Amendment 2 would clarify that the bill applies to assessments made before the effective date of this bill provided that action it is not barred by another provision or rule of law.

BOARD POSITION

Pending.

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FRANCHISE TAX BOARD'S
PROPOSED AMENDMENTS TO AB 1392
As Amended April 14, 1999

AMENDMENT 1

On page 5, line 21, strikeout "paragraph" and insert:

subparagraph

AMENDMENT 2

On page 6, delete lines 14 through 26, inclusive and insert:

(d) This section shall apply to actions commenced before, on or after the effective date of this act, but does not apply to any action regarding a disputed tax assessment that (without regard to this section) is barred by the operation of any law or rule of law, including res judicata, as of the effective date of the act adding this section.